Transnational Legal Practice Committee

CHAIR: ELLEN H. CLARK

Calendar year 2001 was an extremely busy and productive year for the Transnational Legal Practice Committee (Committee). The year will be marked by significant contributions to the ABA's study of multijurisdictional practice and conduct rules but sadly, will also be remembered for the passing of our Senior Advisor, Donald Rivkin who died after a brief battle with cancer in July.

It is a tribute to Don that the efforts of the Committee were a success with regard to changes made by the ABA's Ethics 2000 Commission, on the recommendation of the Committee, to the model rules of professional conduct relating to transnational practice. Results from the Committee's submissions on behalf of the Section of International Law and Practice (SILP) to the ABA's MJP Commission are pending.

Contributions to the Work of the ABA Commission on Multijurisdictional Practice

The Committee was very active on several fronts with respect to the work of the ABA Commission on Multijurisdictional Practice. As a threshold matter, committee members were instrumental in successfully asking the ABA Board of Governors to revise the mission of the ABA MJP Commission so that it explicitly included consideration of MJP issues with respect to international law practitioners. Thereafter, the Committee drafted supplemental testimony on behalf of SILP that was presented to the Commission. At the Commission's request, the Committee designated someone to represent SILP at the Roundtable Hearing held in Miami Beach in June 2001. When the Commission sent follow-up questions to SILP, the Committee drafted the response on SILP's behalf. SILP's written submissions to the Commission are attached as appendices to this report.

Appendix A is the written testimony presented by then-Chair Daniel Magraw and Chair-Elect Robert Lutz to the ABA MJP Commission on February 1, 2001. The testimony requested that the MJP Commission recommend the adoption of the ABA's model rule on Foreign Legal Consultants (FLC) by all the states in order to facilitate practice by in-bound foreign practitioners and remove barriers to the profession experienced by non-U.S. attorneys. The Committee has been working, and continues to work, on the lobbying effort of the 26 states that have yet to adopt the model FLC rules. Support of this effort by the MJP Commission should lend momentum to this ongoing project.

Appendix B is the June 1, 2001 supplemental written testimony that the Committee drafted and SILP adopted and that was submitted to the MJP Commission. This supple-

mental testimony provided more specific information concerning the globalization of law practice and the importance of accommodating transnational practitioners' concerns in any U.S. rules on multijurisdictional practice. The goal of the Committee was to broaden the MJP Commission's viewpoint beyond that of exclusively domestic concerns. In addition, the Committee responded to the proposal by the Association of Professional Responsibility Lawyers—which was the only specific proposal at that time. With respect temporary practice, SILP, at the recommendation of the Committee, suggested that the APRL proposal be modified slightly in order to make it applicable to international practitioners. As to permanent multijurisdictional practice by international practitioners the Committee recommended the MJP Commission endorse the ABA Model FLC Rule (which it later did).

Appendix C is the June 30, 2001 response by SILP to the follow-up questions posed to SILP by the Commission. After the Committee prepared this document, it was transmitted to the Commission by SILP Chair Bob Lutz. Appendix C addresses issues concerning the ethics provisions and disciplinary authority to which international practitioners should be subject. SILP encouraged the MJP Commission to adopt the proposed changes to ABA Model Rule of Professional Conduct 8.5 that had been proposed by the Ethics 2000 Commission; as a general rule, the revised comment to Rule 8.5 would apply the choice of law provisions in Rule 8.5 to lawyers engaged in transnational practice.

Other Activities Related to the Work of the ABA MJP Commission

In addition to the formal submissions in Appendices A, B, and C, the Committee undertook additional activities relevant to the work of the ABA MJP Commission. First, the Committee was proactive in gathering supporting material to submit to the Commission. The Committee persuaded American Bar Foundation Researcher Carole Silver to update her research and provide the Committee with information concerning foreign lawyers in the U.S. and international work by U.S. lawyers. Committee members used their contacts to help research and find examples to support for SILP's position that attorneys in good standing in their home jurisdiction should be admitted to practice in a second jurisdiction without restriction, except for areas reserved under public policy grounds. The Committee began a comparative study of multijurisdictional practice rules from different jurisdictions so as to provide the MJP Commission with example of more liberal rules on transnational practice abroad. The Committee prepared testimony for both the Ethics 2000 Commission and the MJP Commission on the issue of freedom of access to a second jurisdiction by attorneys in good standing under principles of "full faith and credit."

At the request of the Committee and on behalf of SILP, Josh Markus, SILP vice-chair and partner in the Miami office of Hughes Hubbard & Reed, LLP, gave oral testimony at the June 2001 Miami Beach Roundtable held by the MJP Commission. Mr. Markus discussed SILP's position on proposed Model Rule of Professional Conduct 8.5 and the issues of international practitioners advising clients in the United States on a temporary basis and fielded questions requiring further study. As a result of the roundtable meetings, the Committee prepared supplemental written testimony for submission to the MJP Commission.

Laurel Terry, vice-chair of the Committee and a professor at Penn State Dickinson School of Law, independently submitted to the MJP Commission several charts about global jurisdictional practice and alternate MJP schemes in non-U.S. jurisdictions for comparative review. The Committee adopted Ms. Terry's findings and supported her submission.

Participation in State-Based Dialogues about Multijurisdictional Practice

In addition to the Committee's activities with respect to the ABA Commission on Multijurisdictional Practice, individual Committee members also monitored the MJP activities in other states. Josh Markus, for example, has been active in presenting SILP's position to the Florida MJP Commission. (Florida is an important state for international practitioners.) The Committee leadership recently has discussed other ways that it can monitor and participate in the MJP discussions that are occurring in individual states.

The Committee prepared testimony for both the Ethics 2000 Commission and the MJP Commission on the issue of freedom of access to a second jurisdiction by attorneys in good standing under principles of "full faith and credit."

Proposed Revision to Rule 8.5 Submitted to the ABA Ethics 2000 Commission so that the Choice of Law Provisions Apply to Transnational Legal Practice

During the past year, SILP also participated in the work of the ABA Commission on Evaluation of the Rules of Professional Conduct, commonly known as the "Ethics 2000 Commission." The Committee prepared and SILP submitted written testimony addressing proposed comment 7 of Model Rule of Professional Conduct 8.5. The Committee recommended that the comment be revised so that Rule 8.5's choice of law provisions would apply—as a general matter—to transnational lawyers. Appendix D is a copy of SILP's May 9, 2001 submission to the Ethics 2000 Commission.

SILP's efforts were successful. SILP's proposed changes to the comment of Rule 8.5 were incorporated into the American Bar Association, Commission on Evaluation of the Rules of Professional Conduct, Report with Recommendation to the House of Delegates (August 2001). The Committee considers this change one of its most significant accomplishments of the year.

This proposed change has not yet been considered by the ABA House of Delegates. During the August 2001 ABA Annual Meeting, the House of Delegates began its consideration of the Ethics 2000 Commission's report. The House will consider the Ethics 2000 Commission's report rule-by-rule, in numerical order. As a result, the House of Delegates did not consider Proposed Rule 8.5 in August 2001 in Chicago. Proposed Rule 8.5, significant to international practitioners, may come before the House of Delegates in February 2002 in Philadelphia or in August 2002 during the Annual Meeting in Washington D.C.

Monitoring the Adoption of the ABA Model Rule Respecting Legal Consultants [the Model FLC Rule]

In 1993, SILP proposed and the ABA Board of Governors adopted a Model Rule Respecting Legal Consultants. See American Bar Association Section of International Law and Practice, *Report to the House of Delegates, Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207 (1994). Not all states have adopted, this rule, however. *See, e.g.*, ABA Section on Legal Education and Admissions to the Bar, Comprehensive Guide To Bar Admission Requirements, Chart XII, Other Licenses and Registrations, *available at* http://www.abanet.org/legaled/publications/compguide2000/cgchart12.html. Although ABA President Martha Barnett wrote state bar presidents in 2000 urging adoption of the ABA Model FLC Rule, little action occurred.

During 2001, the Committee considered this situation and determined and that one reason for the lack of action may be the lack of clarity about the jurisdiction that should sponsor a Model FLC Rule. The Committee determined that one approach to this problem

would be to locate a specific individual in key states who would agree to sponsor the Model FLC rule in the state system. Committee member Cliff Hendel has agreed to coordinate the overall efforts to locate state-specific liaisons. Some liaisons have already been located (e.g., Laurel Terry in Pennsylvania), but interested Section members are encouraged to contact the Committee to assist with this effort.

Revisions to the Committee's ABA Web site to Allow One-Stop Shopping For Transnational Legal Practice Issues

In response to Rachel Pittman's request that committees submit proposed Web page changes by December 6, 2001, this Committee responded with extensive content for its up-until-now empty Web site. Although these items had not yet appeared on the Web site as of mid-January 2002, the Committee's Web site should soon serve as a clearinghouse for information related to transnational legal practice issues. Among other things, the Committee's revised Web page will include information and links to the GATS 2000 negotiations, the ABA MJP Commission, global MJP schemes, the ABA Model Rule regarding Foreign Legal Consultants, and a summary of the existing FLC rules in the U.S. The Committee believes that the addition of such a Web site will be a major accomplishment and extremely useful to SILP members.

Preparation of the SILP Report and Recommendation Concerning the GATS 2000 Negotiations

Committee Vice-Chair Peter Ehrenhaft prepared on behalf of the Committee a report and recommendation concerning the ongoing GATS 2000 negotiations on legal services. This report was approved by SILP on October 13, 2001 at its meeting in Monterrey, Mexico. This Report was submitted to the ABA Board of Governors on November 10, 2001. The Board deferred action in order to allow the ABA House of Delegates to consider this issue during the February 2002 Mid-year Meeting in Philadelphia. Appendix E is a copy of SILP's Report and Recommendation.

In sum, it was an active year for the Committee. The Section below summarizes some of the Committee's activities in chronological order.

Chronology of Events

February 1, 2001. SILP testified before the ABA MJP Commission and filed written testimony prepared in large part by the Committee.

March 28, 2001. The Committee coordinated efforts to locate additional materials for the ABA MJP Commission to support SILP's position that attorneys in good standing in their home jurisdiction should be able to practice in the Host Jurisdiction.

May 9, 2001. SILP submitted written testimony, prepared by the Committee, to the ABA's Ethics 2000 Commission addressing proposed comment 7 of Model Rule of Professional Conduct 8.5, requesting that the choice of law provision apply to transnational attorneys.

May 2001. The Ethics 2000 Commission accepted the Committee's proposal that the Model Rule of Conduct 8.5 applies to foreign attorneys practicing temporarily in the United States.

June 1, 2001. A SILP representative—briefed by the Committee—participated in the Roundtable Hearings held in Miami Beach by the ABA MJP Commission.

June 1, 2001. SILP submitted supplemental testimony to the ABA MJP Commission. Among other things, this supplemental testimony responded to the APRL proposal sub-

mitted to the ABA MJP Commission; it also proposed adoption of the ABA Model FLC Rule.

June 30, 2001. The Committee filed a written response to the follow-up questions posed by the MJP Commission.

October 13, 2001. SILP adopted the Report and Recommendation on Negotiation Proposals Regarding Foreign Market Access for U.S. Lawyers.

November 10, 2001. The ABA Board of Governors deferred action on the Report and Recommendation Concerning Market Access in order to allow the House of Delegates to consider the issue.

November 31, 2001. The Interim Report of the ABA MJP Commission endorses the ABA Model FLC Rule.

December 6, 2001. The Committee submits extensive content to Rachel Pittman for the Committee's Web page.

Significant Submissions of the Committee to the ABA MJP and Ethics 2000 Commissions and to the ABA Membership

Appendix A. Submission to the ABA MJP Commission on the ABA Model Rule for Foreign Legal Consultants

COMMISSION ON MULTIJURISDICTIONAL PRACTICE

Executive Summary, Testimony of Daniel B. Magraw, Chair
Section of International Law and Practice

February 1, 2001

Impact of Domestic Rules on Transnational Practice

In August 1993, the House of Delegates of the American Bar Association approved a Model Rule for the Licensing of Legal Consultants (Model Rule). This action was motivated by a recognition, as stated in the Report of this Section, that the "explosive growth of international economic activity, and more particularly in the transnational flow of goods, services, labor and investment" resulted in the "need for more effective means of delivering legal services across national boundaries and for better means of integrating lawyers trained in different legal systems into the same law firms." The Report noted as well the complaint of foreign lawyers that "while American lawyers enjoyed broad rights of practice in their respective countries, the reverse is not true. Even after the decision of the United States Supreme Court in *In re Griffiths* [413 U. S. 717 (1973)], the only way in which foreign lawyers could engage in the practice of law in the United States, even if limited to advice on the law of his or her own country, was, with certain limited exceptions, to attend an accredited American law school, sit for the bar examination and become a full member of the bar."

The problems identified in 1993 exist in aggravated form in 2001. This Section, principally through its Transnational Legal Practice Committee, is engaged in a continuing effort to facilitate the ability of American lawyers to offer their services to both domestic and foreign clients outside the territory of the United States. In recent years, these efforts have concentrated on enabling U.S. lawyers to establish offices in Japan, India and other Asian nations, Latin American countries, the emerging democracies in Central and Eastern Europe and, in particular, France and other nations comprising the European Union. Time and again, we are confronted with the contention that we advocate freedom of access for American lawyers abroad that is far more comprehensive than that accorded foreign lawyers

in the United States. American representatives in General Agreement on Trade in Services (GATS) negotiations will be presented with comparable arguments. The Commission is, of course, aware of these realities, but we call attention to them nonetheless by way of emphasizing the impact its recommendations will have on the transnational practice of American lawyers and law firms. However, we also know that, while rights of establishment are important to our clients (and lawyers), the delivery of legal services abroad is much greater through transit visits or through written or electronic advice from outside. As with the right to open offices, our trading partners ask what their nationals can expect here. Therefore, the domestic rules on multijurisdictional practice have a particularly important impact on the members of our Section.

Importance of the Model Rule

The House of Delegates' 1993 resolution contained this language: "The American Bar Association recommends that each State not presently having a rule for the licensing of legal consultants adopt such a rule conforming to the Model Rule and that those States and the District of Columbia having such rules conform them to the Model Rule." In spite of this recommendation, only twenty-three States and the District of Columbia have adopted any form of rule for the licensing of foreign legal consultants and many of those are less accommodating than the Model Rule. Several major commercial States have not enacted any rule.

There is a growing impatience on the part of our foreign negotiating partners with this lackluster record, and there is an accelerating concern with the lack of a truly national American policy on this subject. The Model Rule sets forth a simple, easy-to-administer set of guidelines for permitting foreign lawyers to practice in this country while at the same time requiring them to adhere to local rules respecting "attorney-client privilege, work-product privilege and similar privileges" and subjecting them "to professional discipline in the same manner and to the same extent as members of the bar."

We would accordingly urge the Commission, in its final report or recommendations, to call upon all States to adopt the Model Rule and to exhort the American Bar Association to devote sufficient time, personnel and resources to this effort to make this goal attainable.

Examinations of Foreign Lawyers

Many foreign lawyers, for a variety of reasons, find the status of foreign legal consultant insufficient for their professional needs and wish to become full members of the bar. At the same time, experienced foreign practitioners consider the requirement of most States that they study in an accredited American law school as a condition of taking the standard bar examination burdensome and expensive as well as insulting. We believe that while it is probably necessary to require such lawyers to sit for and pass an examination before they are admitted to the bar, the examination need not be preceded by law school study or be as comprehensive as the examinations administered to law school graduates.

In a further elaboration of these views which we will deliver to the Commission in due course, we will make a more detailed recommendation as to the persons who would be entitled to take this examination, the subject matter of the examination and comparable matters. We note here that the way has been shown by the Law Society of England and Wales which administers a Qualified Lawyers Transfer Test, "a conversion Test which enables lawyers qualified in certain countries outside England and Wales, as well as UK Barristers, to qualify as solicitors. In an increasingly competitive business world, lawyers with

a dual qualification will be able to offer a more comprehensive service to clients." Of equal significance is the fact that the Law Society, through The College of Law, provides educational and training facilities for Test applicants.

It is worth noting as well that American Institute of Certified Public Accountants (AICPA) has promulgated an International Uniform Certified Public Accountant Qualification Examination (IQEX) out of a recognition that in "today's global business environment, international reciprocity for professional accountants has become an increasing concern. International reciprocity simplifies cross-border practice and enhances the prestige of the accounting profession. Furthermore, today's accounting environment has been influenced greatly by international agreements such as the North American Free Trade Agreement and the GATS. While these agreements do not require signatory countries to enter into professional licensure reciprocity agreements, they do impose an obligation to work toward international reciprocity." Notwithstanding the differing regulatory and professional environments in which the accounting and legal professions operate, the considerations cited by the AICPA apply with equal force to our profession.

Other Matters

The growth of the global economy and clients to serve it has increased the demand for legal services on a global scale. It is believed by the Section of International Law and Practice that the large demand for legal services provided by U.S. lawyers and their firms can only be met through liberalized market access regimes worldwide. U.S. lawyers have been at the forefront of developing styles of counseling, forms of agreement and the thoroughness of due diligence in both investigation and documentation that have become the world's standard. These commonly followed practices raise questions of the unauthorized practice of law under the current regulatory regime in the United States. It is the view of the Section of International Law and Practice, that in the modern world, in which the services of American lawyers are sought by clients around the globe, rules must be fashioned that enable lawyers to provide those services without concerns about the inappropriate imposition of barriers based on the geographic concept of the unauthorized practice of law. If U.S. lawyers are to obtain access to foreign markets in which they provide services, it is necessary for the U.S. market to permit similar access to foreign lawyers. The Model Rule provides the model criteria for liberalizing global access to the legal profession.

This principle is key not only for establishment purposes but, perhaps even more importantly, for the much more common means of the provision of legal services of a transient nature (i.e., by telephone, telecopy, e-mail or special meeting). The Section of International Law and Practice also urges the Commission to consider and support efforts, such as through the GATS, which would create appropriate procedures under which international lawyers could also be granted "transient professional visas" that would permit such lawyers to render advice of a transient nature in a country, and not subject these lawyers to charges of the unauthorized practice of law, or violation of labor laws or immigration rules.

In considering an appropriate standard for the realities of multijurisdictional practice, the ABA can and should consider the development within the European Union (EU) of rules that are clearly more liberal with respect to the rights of lawyers from one Member State to engage in multijurisdictional practice throughout the EU than the current situation within the United States. This is true despite the EU's lack of common language and less consistency in legal traditions and court procedures between the Member States than exist among the states of the United States. In the EU, lawyers are able to carry on freely modern

international legal practice. This is in sharp contrast to the limiting regulatory regime in the United States.

With the Commission's leave, we will elaborate these and comparable considerations in our formal submission and testimony.

Respectfully submitted,
Daniel B. Magraw
Chair, Section of International Law and Practice
of the American Bar Association

Appendix B. Supplemental Testimony By SILP to the MJP Commission responding to the APRL proposal and giving recommendations as to temporary and permanent presence in a host jurisdiction.

MJP Commission on Multi-Jurisdictional Practice
c/o John A. Holtaway
ABA Center for Professional Responsibility
541 No. Fairbanks Ct.
14th Floor
Chicago, Illinois 60611 June 1, 2001

Re: ABA Section on International Law and Practice Follow-up Testimony on Multi-Jurisdictional Practice Attorney Conduct Rules

Dear Members of the MJP Commission:

The Section of International Law and Practice (the "SILP") of the American Bar Association is pleased to submit the following supplemental testimony regarding multi-jurisdictional practice. The position of the SILP has been largely developed under the guidance of the Section's Transnational Legal Practice Committee, focusing on issues of cross-border transnational practice, lawyer presence and licensing.

The SILP's submission is organized into four sections. The first section provides background information that should help the MJP Commission understand and respond to its mission to address international multi-jurisdictional practice issues, as well as domestic multi-jurisdictional practice issues. The second section provides the SILP's response and rationale to the issue of temporary multi-jurisdictional practice that occurs in an international context. The third section provides the SILP's response and rationale to the issue of permanent multi-jurisdictional practice that occurs in an international context. The fourth section provides more detailed information about various international multi-jurisdictional practice issues and schemes and explains why it is important for all states to adopt the ABA Model FLC Rule for Legal Consultants, defined below, even if a particular state does not anticipate ever having foreign practitioners within its borders.

I. Background Information About the Globalization of U.S. Law Practice

Although the Mission Statement that is posted on the MJP Commission's web page does not yet include this language, in October 2000 the ABA Board of Governors Operations Committee directed the MJP Commission to "review international issues related to multi-jurisdictional practice in the United States." See November 1, 2000 letter from Harriet Miers to Bar Leaders regarding the MJP Commission on Multi-Jurisdictional Practice on Fast Track, available at http://www.abanet.org/cpr/mjp-gillers_cov_memo.html. The SILP has submitted this supplemental testimony in an effort to assist the MJP Commission to respond to the international aspect of its mission.

On February 1, 2001, the undersigned, as Chair of the SILP, presented testimony discussing the impact of domestic licensing rules on transnational legal practice and the importance of the ABA Model Rule for the Licensing of Legal Consultants (the "Model FLC Rule") adopted by the House of Delegates in 1993. During that testimony, the SILP referred to the Model FLC Rule. In addition to its hard copy submission of the Model FLC Rule, the SILP has attached (see Appendix A) an electronic copy of the Model FLC Rule and accompanying Report to the electronic version of this testimony submitted to the MJP Commission and asks that the MJP Commission post the Model FLC Rule on its web site so that it will be accessible to all jurisdictions. The Model FLC Rule, which has been adopted by nearly 23 states in the United States, has for its goal the liberalization of global access to the legal profession. During my February 2001 presentation on behalf of the SILP, I spoke not only of the need to provide access for cross-border lawyer **establishment,** but also of the need to make the provision of legal services possible on a **transient basis** in jurisdictions where a lawyer is not a member of the local bar without raising questions of unauthorized practice of law. This supplemental testimony provides additional background information about transnational multi-jurisdictional practice and the SILP's responses to specific proposals that were offered subsequent to the SILP's prior testimony.

The practice of law has changed significantly in the last decade as more clients are involved in the "global market." Thus, while the MJP Commission reviews international issues related to multi-jurisdictional practice, it is useful to understand the realities of cross-border legal practice on an international scale, including statistics on the globalization of the legal profession and the ever-increasing presence of American lawyers and law firms abroad. As clients' business needs expand, they expect their attorneys to grow in the scope of their practice. Instant global communications and rapid air travel make this possible and have become common and affordable. The number of American lawyers involved in transnational transactions and disputes has risen dramatically. Cross-border work, once the domain of a few international specialists has become a part of the practice of countless lawyers in all parts of the country.

Published analyses support these observations. Seventy firms identified in Martindale-Hubbell online information have established approximately 400 foreign offices, as reported in April 2001 on MH online (http://www.marhub.com). In January 2000, in the list of The American Lawyer's "Top 100 Firms", 72 had at least one foreign office. The International Financial Law Review in 1999 listed firms based in the U.S. having 343 foreign offices in the aggregate. For more detailed and narrative information about the foreign activities of these law firms, please see Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 Law & Pol'y in Int'l Bus. 1093 (2000). Professor Silver's research shows that foreign offices of U.S. firms are growing in number and size, and that the legal staffs of those foreign offices are becoming more diverse in terms of education and law licensing. Her findings have been updated in Silver, "Lawyers on Foreign Ground," in Careers in International Law, 1—21 (M. Janis & S. Swartz, eds. 2001).

Clients are the main driving force behind this global expansion of legal practice today. Clients want to work with the lawyers they know and trust. They expect their lawyers to travel on their behalf and advocate their interests wherever needed. U.S. lawyers are anxious to serve where asked and to offer their unique services. However, they are often met by access rules in the several jurisdictions in which they want to work or in which their clients seek their advice. Similarly, access rules for foreign lawyers licensed abroad, but temporarily transacting business in the US, are unclear, unknown or inadequate.

II. THE SILP'S RECOMMENDATIONS REGARDING TEMPORARY PRESENCE

A. The SILP Endorses the APRL Proposal, as Modified

During the February 2001 MJP Commission Hearings in San Diego, the Association of Professional Responsibility Lawyers ("APRL") submitted a proposed recommendation concerning "transient" or temporary multi-jurisdictional practice. The SILP supports this proposal, provided that the proposal's language is modified to include transnational multi-jurisdictional practice, as well as domestic multi-jurisdictional practice.

The SILP recommends that the APRL Proposal on temporary presence be modified to refer to the practice of law in another "jurisdiction" rather than making reference merely to another "state", so as to make the proposal applicable to international practitioners. The SILP further recommends that a definition of the word "jurisdiction" be provided as a means to incorporate important principles that were identified in the Model FLC Rule. Thus, the SILP endorses the APRL proposal if amended as follows:

> The prohibition on the unauthorized practice of law shall not apply to an attorney duly licensed and authorized to practice law in another jurisdiction ~~state~~ while such attorney is temporarily in this State and is engaged in either: (i) a particular matter, or (ii) particular matters to the extent such matters arise out of or are otherwise reasonably related to the lawyer's practice in such other jurisdiction ~~state.~~
>
> *"Jurisdiction" means any State, District or Territory of the United States of America or any foreign country having a recognized legal profession, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.*
>
> (Italics and underlining added to show amendment to APRL Proposal; strikeouts show suggested deletions).

B. The Reasoning Behind the SILP's Endorsement of the APRL Proposal

The SILP has endorsed the APRL proposal, as modified, because the SILP believes that this "full faith and credit" approach is in the best interests of clients, is consistent with protection of the public interest, and would also assist U.S. lawyers engaged in transnational multi-jurisdictional practices. As the statistics in the background section of this letter indicate, many clients operate in a global context and need global legal solutions. While clients do and will continue to use local counsel, clients often want the ability to have their customary lawyer advise them, even with respect to matters that arise outside of that lawyer's home jurisdiction. The APRL proposal does not force clients to use lawyers who are licensed outside the host jurisdiction, but simply lifts the ban on clients selecting the counsel of their choice. The SILP believes that the transient lawyer's **duty of competence**, together with the availability of a liability system, offers sufficient protections to clients who wish to select lawyers who are not licensed in the host jurisdiction and that protections can be put in place to ensure that regulators can discipline all lawyers practicing in the jurisdiction and require compliance with local rules.

Therefore, to respond to the realities of the globalization of law practice, the SILP endorses the APRL proposal as modified and recommends the implementation of a system in which any jurisdiction in which a lawyer is performing legal services ("host" jurisdiction),

recognizes the qualifications of a lawyer admitted in another jurisdiction ("home" jurisdiction), if the latter meets certain minimum requirements for testing the knowledge of applicants for admission to practice, reviews the character and moral standards of applicants, and provides a system for disciplining lawyers failing to meet applicable standards of conduct. Such recognition should cover legal services performed on a transient basis in the host jurisdiction for no more than "x" days per year (perhaps up to 180 days). The SILP estimates that at least half of its nearly 15,000 members require such rights for transient entry in other countries, making this a *real issue* for the ABA.

Such a system in the United States would simply apply principles of "full faith and credit" to licensing actions of other states, as is now used for motorists, doctors and architects. It would remove the incongruity of conflicting state rules and the uncertainty inherent in different rules of attorney conduct that affect multi-jurisdictional practice. Because U.S. clients need global multi-jurisdictional practice as well as domestic multi-jurisdictional practice, the APRL proposal should be extended to lawyers admitted in other countries, and serve as a model for U.S. lawyers providing services in those countries. Although clients needs and public interest should drive the MJP Commission's recommendations, the SILP notes that unless we can assure foreign lawyers that they enjoy rights to work here, it is difficult to request such rights for U.S. lawyers abroad.

III. THE SILP's RECOMMENDATIONS REGARDING PERMANENT PRESENCE

A. For Transnational Permanent MJP Practice the SILP recommends that the MJP Commission endorse the ABA Model FLC Rule

In addition to its proposal regarding temporary presence, APRL presented the MJP Commission with a "Green Card" proposal regarding registration of lawyers who have more than a temporary presence in the host jurisdiction. At this time, the SILP has chosen not to endorse the APRL proposal regarding permanent presence or ask the MJP Commission to extend this proposal to foreign lawyers who wish to practice permanently in the United States. Instead, the SILP proposes an approach that comports with the way that many other countries address multi-jurisdictional practice and anticipates the approach which will be taken by other countries in the future. Specifically, the SILP asks the MJP Commission (i) to help it disseminate information about the Model FLC Rule that the ABA adopted in 1993 and (ii) to recommend that states immediately enact the provisions of the Model FLC Rule.

As to permanent attorney registration of a U.S. lawyer in a state in which the lawyer was not previously admitted, the SILP has no objection to the APRL proposal on permanent registration of lawyers admitted in other states. However, the SILP believes that the more modest approach contained in the Model FLC Rules responds to the needs of clients to be able to hire foreign lawyers, while adequately protecting the public interest.

Adoption of the Model FLC Rule throughout the United States would have the added benefit of assisting the ABA in its efforts to facilitate the permanent establishment of law offices internationally. Recognizing foreign lawyers' home qualifications in the United States is an essential first step in acquiring rights for U.S. lawyers to practice U.S. law, establish offices, and be licensed as lawyers abroad. From that point of view, the SILP is continuing to work for the adoption of the Model FLC Rule on the licensing of foreign legal consultants. The Model FLC Rule recognizes and gives full faith and credit to the licensing actions of foreign jurisdictions. However, as of this writing, only 23 states and the

District of Columbia have adopted a FLC rule (not all in the text of the ABA's Model FLC Rule—indeed, some with unfortunate deviations as are discussed below). The campaign continues to seek the implementation of the Model FLC Rule nationwide to serve the needs of both clients located in the United States and U.S. lawyers.

B. The Reasoning Behind the SILP's Endorsement of the Model FLC Rule for Transnational Non-Temporary Law Practice

The SILP has no objection to the APRL proposal on permanent attorney registration of a U.S. lawyer in a state in which the lawyer was not previously admitted. On the other hand, the SILP has not endorsed this aspect of APRL's proposal. The SILP recognizes that the "Green Card" portion of APRL's proposal, which permits lawyers to register and engage in permanent practice, may be more controversial than the temporary presence portion of APRL's proposal. The SILP further recognizes that some individuals might find it even more controversial to extend APRL's "Green Card" concept to foreign lawyers who wish to practice permanently in the U.S. Therefore, at this time, the SILP asks for permanent transnational multi-jurisdictional practice, the MJP Commission recommend states adopt the Model FLC Rule, which has already been endorsed as official ABA policy by the House of Delegates at the Annual Meeting in 1993.

As explained earlier, the SILP believes that the Model FLC Rule supports client needs and public interest. Clients in the United States regularly need access to lawyers with global expertise. For legal matters that involve another country, these clients may want to work with the lawyers from that country who they know and trust. U.S. lawyers may also want the opportunity to hire such foreign lawyers in order to provide the complete expertise their clients need.

IV. Reasons Why The MJP Commission Should Encourage All States to Adopt the Model FLC Rule, Even if a State Does Not Anticipate Having Many Foreign Lawyers in its Jurisdiction

In 1993, the ABA officially endorsed the Model FLC Rule, which recognizes and gives full faith and credit to the licensing actions of foreign jurisdictions. However, as noted above, only 23 states and the District of Columbia have adopted some form of FLC rule. Some states probably have not adopted the Model FLC Rule because they do not perceive a need for adoption of the rule in the absence of a significant number of foreign lawyers. As explained below, the failure of all states to adopt the Model FLC Rules has already undermined the position of the U.S. Trade Representative and those U.S. lawyers who want to provide global multi-jurisdictional practice. Therefore, the SILP urges the MJP Commission to recommend adoption of the Model FLC Rule in every state and to explain why adoption of the Model FLC Rule is important, even if the state will never have foreign lawyers in its jurisdiction.

Unfortunately, a number of states have adopted FLC regimes that have departed from the liberal spirit of the original New York rule on which the Model FLC Rule was based. Some of these restrictions are intended to deal with practical problems that the drafters of the rules appear to have anticipated, or at least feared, in their administration, notwithstanding the absence of any evidence of such difficulties in New York or in any of the other states having FLC rules. Other restrictions appear to be essentially protectionist in nature. Whatever their underlying motivations, these restrictions tend to undermine the effectiveness of some of the Rules in achieving their original objective, **which was to afford to**

foreign lawyers a reasonable and practical opportunity to carry on an international legal practice in the United States and, in doing so, to grant to them the functional equivalent of the rights sought by United States lawyers in other countries. Regrettably, unnecessary restrictions in FLC rules adopted by some United States jurisdictions have been seized upon as justification for the inclusion of similar restrictions in foreign laws and rules. This "mirror image" phenomenon has become increasingly evident as the importance of legal services to United States foreign trade has come to be understood and as the United States Government has joined the legal profession in pushing for access to additional geographic markets.

Many of the restrictions that have been included in such non-conforming FLC rules adopted by some states, while generally well-intentioned, have the unintended effect of interfering with the development of smooth and effective professional interaction between foreign legal consultants and members of the bar in the provision of services to clients. At a time when the legal profession is under the most extreme pressure to achieve efficiencies in the delivery of its services, unnecessary restrictions can only impair the ability of American lawyers to remain responsive to the requirements of the international economy.

As explained in greater detail below, the adoption by some states of restrictive FLC rules and the failure of some U.S. states to adopt any FLC rule at all, operate to the detriment of those U.S. lawyers who wish to engage in a global multi-jurisdictional practice. Furthermore, the SILP believes that it is not in any states' interest to have the competitive position of U.S. lawyers undermined in comparison to lawyers from other countries. Therefore, it is important for all states to adopt the Model FLC Rule, even if a particular state does not anticipate ever having foreign practitioners within its borders.

A. The GATS Negotiations

The problems inherent in the lack of uniformity of foreign legal consultant ("FLC") rules in the United States have presented themselves in bold relief in the context of the ongoing negotiations under the General Agreement on Trade in Services (the "GATS"), under the aegis of the World Trade Organization ("WTO"). Such negotiations are beginning this year in Geneva. In those negotiations, the United States Government is attempting, among other things, to broaden the coverage of the GATS' commitments on legal services. The WTO negotiating process involves a procedure of "offer and request" whereby the governments offer to "bind" reduced restrictions on imports of goods and services and request similar "bindings" or other measures on the part of other countries. In order to comply with this procedure with respect to legal services, the United States Government must identify the restrictions imposed on foreign lawyers in the U.S. to "bind" them state by state. This process, of course, has simply highlighted the patchwork and, in many cases, restrictive nature of the foreign consultant rules in the United States and stimulated demands for less restrictive rights of access to legal markets in the United States, as the tradeoff for more effective access by American lawyers abroad.

A further contextual element for consideration of this issue is the on-going evolution of the rules relating to the integration of the legal profession within the European Union ("EU") and in other federal states such as Canada, Australia and Switzerland. (Appendices B and C summarize some of these rules). These experiences are instructive for the U.S. and especially for the MJP Commission. American lawyers and law firms are at risk of being put in a position of significant competitive disadvantage vis-a-vis British and other European firms, both within the EU and globally. The ABA should make active efforts to encourage

adoption of its Model FLC Rule by state regulatory authorities, to respond to the legitimate concerns of foreign legal professionals, and to strengthen our ability to negotiate favorable treatment in the EU and elsewhere.

B. Domestic Rules that Impact U.S. Lawyers Abroad

(i) Scope of Practice

In framing domestic rules on foreign legal consultants (and their mirror image application to U.S. lawyers abroad), the most important element affecting transnational practice relates to the "scope" of the practice that a foreign (or visiting) lawyer may be engaged in a jurisdiction other than the one of his/her admission. The Model FLC Rule's approach is to *permit* the FLC to engage in any activity as a lawyer in which he or she is permitted to engage under the rules applicable in the country of admission *other than enumerated exceptions*. This Model FLC Rule implies that if the lawyer may advise on the law of the jurisdiction of admission, as well as third jurisdictions or international law, he or she may also do so as an FLC. In *all* respects, the rule of competence applies. Admission to practice does not assure competence, but is only a surrogate, together with practice experience, for presumed competence.

The limited exclusions from scope of practice consistent with this idea are:

(a) appearing before any court, magistrate or judicial officer, other than upon admission *pro hac vice* pursuant to the applicable rule of the courts of the licensing jurisdiction. The effect of this provision is to put foreign legal consultants on the same footing as lawyers admitted in other United States jurisdictions for purposes of any involvement in judicial proceedings. The exception permitting admission *pro hac vice* is not only consistent with current practice, but reflects the increasing need for participation by foreign-trained lawyers in cases before United States courts which involve significant issues or elements of foreign law;

(b) preparing certain types of legal instruments, which by their nature require special training and/or an independent knowledge of local law; and

(c) advising on the law of the "host" state, except on the basis of advice from a person duly qualified and entitled to render such advice.

The scope of practice definition is a critical issue for American lawyers practicing abroad. Practice at the transnational level inevitably involves advice on transactions, disputes and other matters that are, or may be, affected by the laws of several national jurisdictions, as well as by the growing body of international law that applies directly to private transactions and legal relationships. As a practical matter, it is simply not feasible to break down that advice into independent elements to be advised upon separately by different lawyers. Rather, the rendering of such advice is an inherently synthetic process, involving close collaboration among lawyers with the requisite experience and qualifications in dealing with the various bodies of law that are actually or potentially involved. Lawyers advise on transactions and disputes, not on laws in the abstract, indeed part of the task of the international practitioner is the determination as to which country's (or countries') laws will in fact apply to a given matter. Thus, when the Japanese government in its 1986 law concerning practice by foreign lawyers in Japan limited the scope of practice of such lawyers to the giving of advice on the laws of the jurisdictions in which they were admitted to practice,* the ABA registered its

*The Japanese law afforded a striking example of the way in which this kind of restriction can operate to the disadvantage of American lawyers; the law was initially interpreted as meaning that, in Japan, American

strong opposition to that restriction. In this and other contexts, the ABA has generally taken the position that foreign lawyers should be entitled to advise on any law on which they are competent and authorized to provide by the law of the jurisdiction of their admission, with the few exceptions mentioned above.

(ii) Professional Responsibility

Legal advice is frequently rendered by lawyers practicing in firms and other cooperative relationships in which it is neither necessary nor practicable to segregate the different elements of the advice being given, or even to identify the original author of many of such elements. Particularly in the context of transnational transactions, the advice takes on the aspect of a seamless web, involving many lawyers and client personnel. The intent of the Model FLC Rule is that foreign legal consultants have all rights and obligations of members of the bar, subject only to the limitations set forth in the Model FLC Rule. This recognition of their status as members of the legal profession is appropriate in light of the fact that they are, by definition, admitted to practice in a foreign country and is in all respects parallel to the treatment accorded by United States jurisdictions to lawyers admitted in other United States jurisdictions. The Model FLC Rule makes this intent explicit.

The Model FLC Rule also makes it clear that a licensed foreign legal consultant is subject to the same rules of professional responsibility as are applicable to a member of the local bar. Nevertheless, as a member of a foreign legal profession, the legal consultant will *also* be subject to the rules of professional conduct and responsibility of that jurisdiction. There may be occasional conflicts between the two sets of rules by which he or she is governed. These conflicts can ordinarily be resolved by reference to appropriate conflicts-of-laws rules depending upon, among other factors, the place in which the conduct occurred and the nationality and place of domicile of the client or the place where the principal effect of the conduct is felt. In the event that a foreign legal consultant should become the subject of disciplinary proceedings, the court or other authority charged with the conduct of such proceedings should normally consider any relevant differences between the rules of professional conduct and responsibility of the multiple jurisdictions concerned.

(iii) Partnership/Employment Limitations

A significant bone of contention in the effort to open foreign countries to American lawyers and law firms has been the imposition, either on the foreign lawyers or on members of the local bar, of prohibitions against the employment by foreign lawyers of members of the local bar and against the entry of members of the bar into partnership in a foreign law firm. This has proven to be perhaps the most serious obstacle to the creation of foreign offices and law firms with truly multi-national capabilities.

While the rules of professional conduct in most states generally prohibit members of the bar from carrying on the practice of law in partnership with persons who are not members of the bar, this has not been interpreted as prohibiting interstate partnerships of lawyers, nor is it believed that such rules have ever been invoked to challenge the admission of duly qualified foreign lawyers to partnership in an American law firm. There are no prohibitions in the United States upon the employment of members of the bar by non-lawyers or vice versa. Accordingly, the Model FLC Rule preserves the extremely important principle that

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lawyers would be limited to the giving of advice on the laws of the respective American states in which they were admitted to practice.

neither employment of members of the bar by foreign lawyers nor their entry into law partnership with foreign lawyers is prohibited or in any way restricted in this country.

V. CONCLUSION

The SILP endorses the APRL proposal for temporary multi-jurisdictional practice, provided the proposal is amended to substitute the word "jurisdiction" for the word "state" and then adds a definition of the term "jurisdiction."

With respect to non-temporary transnational multi-jurisdictional practice, the SILP recommends that the MJP Commission encourage every state to adopt the ABA Model Rule for the Licensing of Legal Consultants and explain why adoption is important even if the state does not have many or any foreign legal practitioners.

The Model FLC Rule benefits clients and the public interest and also enhances the opportunity for American lawyers and law firms to develop transnational practices on the basis of broad reciprocity and mutual respect for the qualifications of members of recognized foreign legal professions. The way in which foreign lawyers are regulated in this country has a dual impact on the competitive position of American lawyers and law firms in a global economy. First, it directly affects the ability of American firms to add to their ranks lawyers qualified to practice in other jurisdictions, which is a prerequisite to the establishment and expansion of truly multinational practices. Second, it produces an indirect effect through the "mirror image" phenomenon by which arbitrary and unnecessary restrictions in the Rules adopted by various states are seized upon as an excuse for the imposition of similar, or even more stringent restrictions on American lawyers abroad. In order to obtain fair treatment abroad, we must be in a position to accord to foreign lawyers and law firms the possibility of carrying on their practices in the United States, subject to the same scrutiny, regulation and discipline as members of the bars of the United States, but unencumbered by unnecessary and even protectionist restrictions, on a basis of full reciprocity.

The Model FLC Rule follows closely a rule that has been in effect in New York for nearly thirty years, the operation of which has resulted in no significant problems and considerable benefit to the development of New York as a center of international legal services. We believe that this is an issue upon which uniformity of approach among the states is of critical importance.

After years and even decades of relative inaction and inertia on the part of the legal profession in the face of rapid changes in the structure of the global economy, the face of the legal profession is now being altered at a stunning pace. We have a small window of opportunity to influence that change. If we fail to do so, the process will unquestionably go forward without us, to the great detriment of the American legal profession, which has long been the world's leader in the transnational practice of law, and to the disadvantage of United States economic interests, as well as of consumers of international legal services worldwide. It is thus not only appropriate, but also essential, that the American Bar Association takes the lead in establishing a coherent and forward-looking model for the regulation of foreign lawyers in this country and thus, also advances the interest of the U.S. bar in serving clients outside this country.

This MJP Commission has the chance to guide the American Bar Association, and our profession, into a new era in which the principle of competence is recognized as the lodestar for lawyer regulation. The geographic boundaries of our country and the world are generally unnecessary barriers to effective modern law practice. The Section of International

Law and Practice keenly knows this fact from the experience of its members. It urges the MJP Commission to join in that recognition, and lead our colleagues into the promising future.

Sincerely,
Daniel Magraw
Chair
Section of International Law and Practice

Appendix C. SILP Submission to the MJP Commission in Response to the Commission's Follow-up Questions on the applicability of ethics rules and discipline to foreign lawyers

June 29, 2001

MJP Commission on Multi-Jurisdictional Practice
c/o John A. Holtaway
ABA Center for Professional Responsibility
541 No. Fairbanks Ct.
14th Floor
Chicago, Illinois 60611

Re: ABA Section on International Law and Practice Responsive Testimony on Multi-Jurisdictional Practice Attorney Conduct Rules

Dear Members of the MJP Commission:

At the Miami Roundtable meeting of the MJP Commission, held on June 1, 2001, the Section of International Law and Practice ("SILP") of the American Bar Association gave oral testimony in elaboration of some of the points raised in its June 1, 2001, written submission to the MJP Commission. The MJP Commission raised two questions as to which it sought further comments from SILP. These questions, presented below, relate primarily to international practitioners advising clients in the United States on a temporary basis. SILP has requested that its Transnational Legal Practice Committee provide the following commentary on its behalf.

A. Questions Presented

1) If a foreign lawyer practicing law in the United States on a transitory basis should violate rules of professional conduct in the host jurisdiction, should the disciplinary rules of the host jurisdiction or those of the foreign home jurisdiction be applied in the first instance?
2) If the host jurisdiction's rules apply, how are those rules enforced against a lawyer who is only in the host jurisdiction on a transient basis, neither registered nor licensed in the host jurisdiction?

B. Responses from SILP

Summary Response to Question 1:

SILP recommends that the MJP Commission endorse an approach similar to the ABA Ethics 2000 Commission's approach for U.S. lawyers. SILP recommends that foreign lawyers who practice law in the United States on a transitory basis, like U.S. lawyers, be subject to the rules of professional conduct in the Host Jurisdiction even if the foreign lawyer is not admitted in the Host Jurisdiction. In the context of a disciplinary matter, the Host Jurisdiction should apply the same "choice of law" principles to the foreign lawyer that the Host Jurisdiction would apply to a U.S. lawyer, unless a contravening international treaty, agreement or law provides otherwise.

Explanation for SILP's Proposed Answer to Question 1:

The Ethics 2000 Commission recently revised its Proposed Rule 8.5 to recommend that lawyers who practice law on a transitory basis in a U.S. jurisdiction are subject to the rules of professional conduct in the host jurisdiction even if the lawyer is not admitted in that jurisdiction:

> A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction ~~where the lawyer is admitted~~ for the same conduct.

The Ethics 2000 Commission also recommended changes to the "choice of law" provisions in Rule 8.5(b). In a nutshell, Proposed Rule 8.5 uses a three pronged approach. If a lawyer is subject to multiple professional conduct rules, then the disciplinary authority is advised to apply: 1) the rules of conduct of the jurisdiction in which the tribunal sits, if the lawyer is involved in litigation; 2) the rules of the jurisdiction in which the lawyer's conduct occurred; or 3) if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction.

SILP recommends that the MJP Commission use a similar approach for foreign lawyers practicing in the U.S. on a transitory basis unless a contravening international treaty, agreement or law provides otherwise.

In SILP's view, it is unclear whether foreign lawyers *currently* would be covered by the Ethics 2000 Commission's Proposed Rule 8.5 if adopted. At SILP's urging, the Ethics 2000 Commission has recommended that Comment 7 to Proposed Rule 8.5 be amended as follows:

> [7] The choice of law provision ~~is not intended to apply to~~ applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

By modifying comment 7, the Ethics 2000 Commission clarified that Proposed Rule 8.5 applies to U.S. lawyers who are practicing in jurisdictions outside the U.S. SILP endorses this change for U.S. lawyers. (See SILP comment letter attached, dated May 9, 2001, addressed to the Ethics 2000 Commission in support of the revisions made to the Proposed Rule). It is less clear, however, whether the Ethics 2000 Commission intended its proposal to apply to foreign lawyers. (The term "lawyer" is not defined in the "Terminology" of the ABA Model Rules nor is it defined in Proposed Rule 8.5). In SILP's view, the term "lawyer" in Proposed Model Rule 8.5 should be interpreted to include foreign lawyers who practice in the U.S. on a transitory basis.

In sum, SILP believes that it would be useful for the MJP Commission to recommend that foreign lawyers in the U.S. be treated in a manner comparable to the Ethics 2000 Commission's Proposed Rule 8.5 unless contravening international treaty, agreement or law otherwise applies.

This result is similar but not completely identical to the approach used in the European Union Directive 77/249 which governs the transitory practice of law by one EU lawyer in another EU jurisdiction. Article 4 of that Directive makes the transient foreign lawyer subject to certain specified Host Jurisdiction ethics rules:

> A lawyer pursuing activities other than those referred to in paragraph 1 [litigation] shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility. (Emphasis added.)

Thus, the basic approach used in the EU is consistent with the Proposed Rule 8.5 approach that SILP recommends for foreign lawyers who practice in the U.S. on a transitory basis.

Summary Response to Question 2:

The Host Jurisdiction's rules should be enforced against a foreign lawyer in the same manner in which these rules would be enforced against a U.S. lawyer who only practices in the Host Jurisdiction on a transient basis and is neither registered nor licensed in the Host Jurisdiction.

Explanation for SILP's Proposed Answer to Question 2:

SILP contends that the Host Jurisdiction should enforce its rules against a foreign lawyer in the same manner in which those rules would be enforced against a U.S. lawyer who is not licensed in the Host Jurisdiction. For example, ABA Model Rules of Disciplinary Enforcement, Rule 10(A) identifies the follow possible disciplinary sanctions:

- disbarment by the court
- suspension by the court for a fixed period of time not in excess of three years
- probation by the court not in excess of two years
- reprimand by the court or disciplinary board
- admonition by disciplinary counsel
- restitution to persons injured
- costs of the proceeding
- limits on the nature or conditions of future practice

Many of these sanctions could be imposed against a foreign lawyer just as easily as against a U.S. lawyer who is not licensed in the jurisdiction. For example, disciplinary counsel or the board could send an admonition letter to the foreign lawyer; the disciplinary board could reprimand the transient lawyer (in absentia if necessary); and the court could impose conditions on the lawyer's future practice, probation, suspension or disbarment, such that a violation of the court's order by the foreign lawyer in the jurisdiction would constitute a per se "unauthorized practice of law" violation (and perhaps contempt of court). A judgment for "costs and restitution" also could be imposed; SILP believes that U.S. courts would find a satisfactory nexus with the lawyer's conduct in the jurisdiction to support personal jurisdiction. In addition, as contemplated by the ABA Model Rules of Disciplinary Enforcement, Rule 22, the Host Jurisdiction could notify the Home Jurisdiction, which might want to impose reciprocal discipline.

SILP recognizes that it may be more difficult for a disciplinary authority to discipline foreign lawyers who are not admitted to the jurisdiction than it is to discipline domestic lawyers who are admitted in the jurisdiction. On the other hand, SILP does not believe that it will be significantly more difficult to discipline non-admitted foreign transitory lawyers than it will be to discipline non-admitted U.S. transitory lawyers. The Ethics 2000 Commission's "Reporter's Explanation of Changes" explains how such enforcement would operate against U.S. lawyers:

> **1. Paragraph (a): Expand disciplinary enforcement jurisdiction over the lawyer not admitted in adopting jurisdiction "if the lawyer renders or offers to render any legal services" in the jurisdiction.**
>
> Several states have adopted a bracketed provision in Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement that provides disciplinary jurisdiction over "any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state." The Commission believes that this is an appropriate rule to adopt in the Model Rules of Professional Conduct, given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct. There are a number of ways in which discipline might be implemented, including making a disciplinary record and sending it to states in which the lawyer is admitted and having those jurisdictions impose reciprocal discipline. (Alternatively, if disciplinary authorities are ever given a broader range of sanctions, e.g., fines, fee forfeiture or an award of damages, the disciplining jurisdiction could act on the lawyer directly.)

SILP submits that most of the same ideas could apply to foreign lawyers in the U.S.

The European Union uses a comparable approach. Article 7(2) of Directive 77/249 governing transitory practice gives the Host Jurisdiction authority to discipline the transient foreign lawyer and requires notification of the Home Jurisdiction:

> In the event of non-compliance with the obligations referred to in Article 4 and in force in the host Member State, the competent authority of the latter shall determine in accordance with its own rules and procedures the consequences of such non-compliance, and to this end may obtain any appropriate professional information concerning the person providing services. It shall notify the competent authority of the Member State from which the person comes of any decision taken. Such exchanges shall not affect the confidential nature of the information supplied.

While the disciplinary enforcement situation may not be ideal, SILP believes it will work and is necessary in order to accommodate the needed changes about which the Commission has heard so much.

SILP thanks the MJP Commission for this opportunity to provide further information.

Sincerely,
Ellen H. Clark and Timothy E. Powers
Co-Chairs
Transnational Legal Practice Committee
Section of International Law and Practice
American Bar Association

Appendix D. SILP's Submission to the Ethics 2000 Commission on Model Rule of Professional Conduct 8.5

Daniel Magraw, Chair
Robert Lutz, Chair-Elect
Section of International Law and Practice
American Bar Association

To the Members of the Ethics 2000 Commission
c/o ABA Center for Professional Responsibility
14th Floor
541 N. Fairbanks
Chicago, IL 60611

May 9, 2001

Re: Comments to Proposed Rule 8.5

Dear Members of the Ethics 2000 Commission,

The Transnational Legal Practice Committee of the Section of International Law and Practice met last week in Washington DC to discuss, among other things, Proposed Rule 8.5 included in the Ethics 2000 Commission's November 2000 report. As a result of those discussions, the Committee made recommendations to the Section regarding the Proposed Rule 8.5 with particular reference to Comment 7 to that Rule. We endorse the recommendation made, and on behalf of the Section of International Law and Practice, submit to you the following commentary.

Proposed Rule 8.5 addresses the disciplinary authority and choice of law governing attorney conduct:

> **RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW**
>
> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
>
> (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment 7, addressing choice of law in particular, currently reads:

> [7] **The choice of law provision is not intended to apply to transnational practice.** Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law. (Emphasis added).

The Section of International Law and Practice is of the view that making the choice of law

provision inapplicable to transnational practice is inappropriate. The realities of cross-border law practice today involve transactions, disputes and other matters that are, or may be, affected by the laws of several national jurisdictions. In such cases, international practitioners need some guidance as to how conflicts in conduct rules could be resolved, especially if the home jurisdictional rules are silent or ambiguous as to conduct abroad.

Thus, Comment 7 should be amended to read:

> **[7] The choice of law provision in Rule 8.5 applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions address the issue and provide otherwise.**

Comment 7 may have originally been included to avoid creating conflicts with international law for foreign practitioners. However, it is not conflict but rather the lack of clear rules that needs to be addressed by the Comment. Transnational practitioners require more certainty when acting in different countries, whether on a transient or more permanent basis, for clients that may be in the countries of the lawyer's admission, the location of the lawyer's service or in third countries. The revised Comment we propose should provide this greater certainty.

Our revisions are intended to provide clearer guidance to the transnational practitioner. In essence, the transnational lawyer should be guided by the "predominant effect" principle unless applicable international agreements depart from that rule. Excepting transnational conduct situations from the scope of Rule 8.5 does not serve a useful purpose or promote any state interest. Rather, applying Rule 8.5's choice of law principles to transnational practice would be helpful to the numerous and growing number of lawyers engaged in that practice.

As an example, assume that a U.S. lawyer practiced in Asia under a strict local confidentiality rule and engaged in a cross-border transaction there involving a company that had committed fraudulent acts in the past. Assume that the lawyer also practiced in one of the many state jurisdictions that permit or require a lawyer to reveal a client's past fraudulent conduct. If Proposed Rule 8.5 applied to the transaction and the lawyer remained silent, this action probably would be proper under 8.5 because the predominant effect of the lawyer's conduct would be in Asia. Comment 7 as drafted could, however, be read to mean that this issue is "transnational" and thus, not covered, so that the U.S. lawyer in Asia could be disciplined in the U.S. for his failure to reveal facts, even though the more appropriately applicable Asian rule prohibits disclosure.

Thus, the Section of International Law and Practice recommends that Rule 8.5 apply to lawyers engaged in transnational practice unless international law, treaties or other applicable agreements contravene.

Sincerely yours,
Daniel Magraw, Chair
Robert Lutz, Chair-Elect
Section of International Law and Practice
American Bar Association

Appendix E. Report and Recommendation of the Section of International Law and Practice, Negotiation Proposals Regarding Foreign Market Access For U.S. Lawyers (Approved by SILP Oct. 13, 2001, currently submitted to the ABA House of Delegates

AMERICAN BAR ASSOCIATION

SECTION OF INTERNATIONAL LAW AND PRACTICE
REPORT TO THE HOUSE OF DELEGATES

RESOLVED, to better enable American lawyers to assist clients globally through offices established in countries that have signed the General Agreement Trade in Services of the World Trade Organization, the American Bar Association supports the negotiation proposals to the United States Trade Representative regarding access to foreign markets for U.S. lawyers through permanent establishments as expressed and incorporated in the attached "Proposal on Market Access for U.S. Lawyers" dated September 10, 2001.

NEGOTIATION PROPOSALS
REGARDING FOREIGN MARKET ACCESS FOR U.S. LAWYERS
September 10, 2001

1. BENEFITS OF ACCESS TO LAWYERS AND LAW FIRMS

Access to lawyers and law firms with relevant expertise greatly facilitates the growth of world trade, related foreign direct investment in developed as well as developing nations, and cooperative ventures that cross national borders. Lawyers and law firms are also essential for access to capital markets. Individuals and business organizations who are participating in these trans-national economic activities thus quite rationally prefer to obtain legal advice, consultation and assistance from lawyers with relevant experience and expertise. They often prefer to use lawyers and firms with which they are familiar, and in general benefit from having a range of competitive choices for legal assistance.

In short, relaxation of restrictions on foreign lawyers and firms would promote economic development. A WTO agreement along the following lines on access to legal services is thus desirable and justified.

2. ACCESS TO LEGAL ASSISTANCE; RIGHT OF ESTABLISHMENT

a. Right of Establishment

A lawyer who is a member in good standing of a legal profession in a WTO Member, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or public authority ("Lawyer") and a law firm or other association of Lawyers ("Law Firm") such as law firm partnerships shall be permitted to create and maintain a professional establishment in the territory of the Host Member ("Establishment").

b. Registration of Lawyers

As a prerequisite to such Establishment by a Law Firm, each WTO Member may require that senior foreign Lawyers of, or the Law Firm responsible for, the intended establishment register with its Registration Authority ("RA").

c. Registration of Law Firms or Other Associations of Lawyers

One or more Lawyers or a Law Firm may register an Establishment of a Law Firm by notice to the Host Member RA. A Law Firm shall be entitled to permanence of its Establishment, but each WTO Member may condition such permanence on the giving of an undertaking by the Law Firm of responsibility for the Establishment.

3. REQUIREMENTS FOR REGISTRATION

a. Standards for Consideration

The RA's consideration of an application for registration pursuant to Section 2.b. shall be objective and based on neutral criteria. The evaluation criteria shall be defined in writing by the RA, and must be directed toward the applicant's competence to function as a Lawyer or Law Firm. The applicant's educational and professional experience as a Lawyer or Law Firm, and admission to practice law in the Home Member, shall be of primary importance.

b. Application Procedures

Each RA shall process applications for registration fairly and shall act on them in a reasonable period of time.

(i) Written application procedures shall be established by the RA. The written procedures shall be published and made available upon request pursuant to Section 3.d.

(ii) In addition to the language(s) of the Host Member, application procedures and any application forms shall be available in one of the official languages of the WTO.

(iii) Proficiency in the language(s) of the Host Member shall not be required for registration. An objective examination of the professional rules applicable to lawyers of the Host Member may be administered. Such examination shall be consistent with written preparatory materials that are reasonably available to the applicant in the language(s) of the Host Member and one of the official languages of the WTO.

(iv) Denial of an application for registration filed pursuant to Section 2.b. will be in writing, and a statement of reasons will be furnished to the applicant within a reasonable period following submission of the application. A right of appeal shall be available in the case of the denial of an application.

(v) Applicants who have been denied registration shall be permitted to renew their applications, and consideration shall be given to whether the basis for the prior denial has been overcome.

c. Compliance with Professional Rules

The RA may restrict registration under Section 2.b. to Lawyers and Law Firms which agree: 1) to abide by the professional rules in force in the Host Member; and 2) to be subject to the disciplinary rules of the responsible authority in the Host Member. The professional rules must be reasonably available to the applicant in the language(s) of the Host Member and one of the official languages of the WTO.

d. Notification Requirements

In order to ensure the efficient and transparent administration of any requirements for registration, Members shall notify the following to the WTO:

Enquiry points through which all interested persons can obtain written information on requirements for registration; and

Titles of the publications in which requirements for registration, changes thereto and interpretations thereof (including decisions of the RA) are published.

4. SCOPE OF PRACTICE

a. Law Practiced in Home Member

A Lawyer or Law Firm shall be permitted to practice law and to render advice regarding matters with respect to which the Lawyer or Law Firm is authorized to practice law and render advice in the Lawyer's or Law Firm's Home Member.

b. Host Member Law

i. Unless a Lawyer has been qualified as a Host Member Lawyer, a Host Member may prohibit a Lawyer from practicing Host Member law [within the territory of the Host Member], to the same extent that it imposes such prohibitions on its own nationals. The opportunity to qualify as a Host Member Lawyer shall be available to all Lawyers on a non-discriminatory basis.

ii. A Lawyer shall be permitted to associate with Host Member Lawyers pursuant to Section 5, and may transmit to clients advice regarding Host Member law rendered by the Host Member Lawyer with whom the Lawyer is associated.

c. Arbitration Proceedings

A Lawyer shall be permitted to participate, in any capacity, in arbitration proceedings in a Host Member without the need to register pursuant to Section 2.b.

5. FORMS OF PRACTICE AND ASSOCIATION

The Host Member shall not restrict the manner in which a Lawyer associates with other Lawyers or with Host Member Lawyers and shall not restrict the business form in which Lawyers organize their practice, provided that such forms do not differ from the forms in which Host Member Lawyers may practice.

a. Foreign Lawyers, with or without Host Member Lawyers, shall be permitted to form, or to participate together in an existing law firm, to the same extent that Host Member Lawyers are permitted to do so, or to organize their practice jointly in any other business form which is used in the Host Member by Host Member Lawyers.

b. Lawyers shall be permitted to hire, and be hired by, Host Member Lawyers. Lawyers and any entity in which Lawyers associate, including associations with Host Member Lawyers, shall be permitted to hire the personnel considered necessary to provide legal services.

c. A Lawyer shall be permitted to practice law and to render advice under the Lawyer's own name and under the name of a law firm or other entity with which the Lawyer is associated. A Lawyer shall be permitted to use in the Host Member the professional title used by the Lawyer in the Home Member, with reference to the Home Member jurisdiction of admission.

d. Foreign Law Firms shall be permitted to hire Host Member Lawyers, to admit Host Member Lawyers to partnership or equivalent status, and to practice law and render advice under the name of the Law Firm.

REPORT

Introduction.

The ongoing globalization of commercial activity by American businesses makes it imperative that U.S. lawyers and law firms be assured of the right to provide advice and assistance to their clients wherever the clients desire that assistance. The proposal before the House seeks ABA support for recommendations presented to the U.S. Trade Representative for assuring American lawyers the right to establish offices in the other countries

that have signed the General Agreement on Trade in Services ("GATS"). The GATS is one of the agreements signed at the conclusion of the Uruguay Round in 1994 establishing the World Trade Organization (WTO). Under WTO procedures, signatories to the various agreements from time to time thereafter continue to negotiate expansions of access to their markets accorded to nationals of other signatories.

The instant proposal supports a request the United States may make in the context of further GATS negotiations to assure American lawyers the right to establish offices in other GATS member countries. It does not address "transient access" for lawyers who do not seek to open permanent offices abroad. In essence, this proposal seeks on a global basis the principles the ABA has been urging the Japanese Government to adopt for the past 20 years. The requests directed to Japan bore fruit and at least two dozen U.S. firms (and some English and other European firms) have since then been allowed to open offices in that country. Similar efforts were pursued in assuring rights to open offices in China as that country becomes a WTO member.

The fact that the United States may request such "market access" for its lawyers, does not imply that it must be prepared to offer identical and reciprocal treatment for foreign lawyers wishing to open offices in the United States. The negotiations in the WTO are consciously designed to enable countries to request concessions on market access for particular goods or services that they wish to export without accepting the same terms for imports of the same goods or services. As relatively few foreign countries have expressed an interest in seeking rights of establishment for their lawyers in the United States, this request can be made without a commitment to accord identical treatment to foreign lawyers in this country.

Nevertheless, under the leadership of the American Bar Association, the United States has taken important steps to assure foreign lawyers rights to open offices in this country. In 1993 the House of Delegates approved a "Model Rule for Foreign Legal Consultants" that it urged the several States and the District of Columbia to adopt. Since then, 23 States, including most of these with major centers of international trade, such as New York, California, Illinois and Texas, as well as the District of Columbia, have enacted such a Rule. The ABA is continuing to urge all States to adopt such a rule consistent with the 1993 Model and the proposal that is before the House as a model for foreign countries.

The stake of the U.S. legal profession and the ABA in these negotiations

The magnitude of U.S. interest in opening offices abroad cannot be precisely measured, but it is suggested by the fact that approximately 100 U.S. law firms already have one or more foreign offices. The majority of those offices are in London and in other cities of members of the European Union. However, offices have been opened in Eastern Europe, Japan, China, Australia, Canada, Mexico, Brazil and Indonesia, to mention the most significant locations for current world trade. Department of Commerce statistics, that probably understate the value of exports of U.S. legal services, report that "exports" of U.S. legal services were valued at more than $2.8 billion in 2000. While many of these services were provided from domestic offices, a large part was either generated by foreign offices or actually performed in such offices of U.S. firms. The exports exceeded by a factor of more than 500% the value of "imports" of legal services.

Although U.S. law firms have been allowed to open offices in many countries, their rights to continue their practices are generally not guaranteed by treaty, and in some countries are prohibited or severely restricted. Under the auspices of the General Agreement on

Trade in Services (GATS) members are seeking binding commitments to assure a liberal regime for legal and other professional services in as many member states as are prepared to sign. The Office of the United States Trade Representative (USTR) is conducting those negotiations on behalf of this country. It has specifically requested input from affected private sector representatives and invited the American Bar Association, as the principal membership organization of the U.S. legal profession, to express formal endorsement of the proposal that has been developed by ABA members working with the Legal Services Group of the Coalition of Service Industries (CSI). While the ABA need not endorse this (or any other similar proposal), the USTR believes that U.S. economic interests should assist it in negotiating sensible rules affecting their products and services. Therefore, if the ABA is to affect the course of negotiations on legal services access abroad, it should adopt the present (or a comparable) proposal.

The scope of the Proposal for which support is sought.

The Section of International Law and Practice urges adoption of the accompanying Resolution to express ABA support for the principles under which U.S. lawyers may obtain and secure rights to practice from offices abroad. The Proposal was initially prepared by the Legal Services Committee of the CSI, with which ABA representatives and personnel from the USTR closely worked. The Committee worked on these proposals for more than two years, polled all 100 U.S. law firms known already to have offices outside the U.S. and interacted regularly with the Transactional Practice Committee of the Section of International Law and Practice. Thus, although the main sponsor of the Proposal now in the hands of the USTR was the CSI, the ABA had a vital role in the preparation of the document.

CSI is a major non-profit group that has brought together representatives of most of the "service" sectors of the US economy. These include the professional services of architecture, accounting, education, engineering, nursing and, of course, law. They also include the much larger service sectors such as air transport, audio-visual production and distribution, energy exploration, insurance, telecom and tourism—to name but some of the 32 different sectors represented on the Department of Commerce/USTR Industry Sector Advisory Committee on Trade in Services. The USTR estimates that more than 75% of the US GNP is now attributable to services and that they account for 30% of US exports. (The latter figure is probably grossly understated due to difficulties in obtaining reliable statistics on the payment for services. Merchandise is easy to count and value as it crosses an international boundary and must be declared to customs authorities. No comparable regime exists for services.)

The Recommendation does not expressly deal with the issue of possibly even greater interest to more U.S. lawyers, namely, their right to provide legal services in foreign countries without opening a permanent office there. They wish to be assured continued rights for transient access. Lawyers are far from alone in that desire. However, it was the decision of the CSI (and the recommendation of the USTR) that the United States should seek assurances for transient access for all service providers— or at least all professional service providers— through a "horizontal" agreement covering all such sectors. If such an agreement were reached, the ability of U.S. lawyers to enter foreign countries on a temporary and occasional basis to provide services to both local and non-local clients (including most importantly their U.S. clients) would be best assured.

Two issues the USTR may face are not addressed in the Recommendation: First, foreign countries may demand comparable rights in the US, and the federal government has been

reluctant to commit itself to require the States— that retain the right and responsibility to license professional service providers— to change their rules or practices. However, this does not make the case for seeking U.S. access to foreign markets less compelling. As noted earlier, few foreign countries have sought to "export" legal services to the U.S. Their major interests in the next round of WTO negotiations are likely to focus on other types of service providers (e.g., nurses or computer specialists) or on agricultural goods or reforms of U.S. antidumping law. Moreover, U.S. implementing legislation with respect to the GATS (the Uruguay Round Agreements Act) specifies that no individual may sue a State for its failure to abide by commitments accepted by the federal government in the GATS or other WTO Agreements. Only the federal government, itself, may bring such suits were it persuaded to do so. No such suits have been brought to date.

Second, the "Foreign Legal Consultant" Model Rule adopted by the ABA and in force in one form or another in 24 jurisdictions addresses only the issue of permanent establishments by foreign lawyers, that is, the counterpart of the attached CSI proposal. The FLC Rule does not address transient practice in the US by foreign lawyers. This is a subject with which the ABA's Commission on Multijurisdictional Practice is dealing and as to which no consensus as yet emerged in that body. Nevertheless, the ABA need not await the Commission's report to support the attached Recommendation. The resolution deals only with permanent establishments by U.S. lawyers, just as the ABA's FLC Rule deals with foreign lawyers seeking to open offices here. It merits approval on its own as it deals with a key issue apart from the transient access question. That issue is likely to be considered by the GATS on a broader basis than only legal services. Securing temporary rights to provide services and assistance into and within WTO member nations can be most effectively accomplished on a horizontal basis applicable to all providers of professional services, including, for example, accountants, architects, engineers, nurses and teachers. The ABA may await USTR action in that fashion on that issue which is at the core of the MJP Commission's work.

What the Proposal Seeks

The Proposal seeks commitments, from all GATS members willing to accept them, that they will create a "transparent" and fair regime for registering qualified foreign lawyers that wish to practice from offices in that country. Both individual lawyers and firms may register, reflecting the fact that in many countries there are few, if any, rules regarding the qualifications of persons rendering legal advice but substantial rules applicable to the establishment of permanent offices from which consulting services are offered.

The Proposal suggests that admission to the bar in another GATS member ought, as a rule, be sufficient basis for permitting registration, so long as the individual registrant remains in good standing. The evaluation of competence is to be based on "objective" and "neutral" criteria. Denial of registration would be in writing and cannot be based on a lack of proficiency in the local language. However, familiarity with local rules of professional responsibility may be required and tested in one of the official languages of the WTO (English, French or Spanish).

The most critical portion of the Proposal deals with the "scope of practice" in which a foreign lawyer may perform. Section 4.a. states that the foreign lawyer will be permitted to practice law and render advice with respect to any matter which the lawyer or his/her firm is authorized to practice in the lawyer's "home" jurisdiction. This is intended to incorporate the ABA's Model Rule 1.1, namely, that the "scope of practice" is essentially

based on the individual lawyer's competence. Thus, a lawyer in New York may be able to advise on the corporation and sales and banking law of New York but not on probate or criminal law of New York. At the same time, that lawyer may be competent to advise on the corporation law of Delaware, the UN Convention on International Contracts for the Sale of Goods and the ICC forms of international letters of credit. The lawyer may be competent to render advice on the sales or employment or intellectual property laws of a number of countries other than the law of New York. As the Report accompanying the ABA's Model Rule for FLCs pointed out,

> "The scope of practice is a critical issue for American lawyers practicing abroad. Practice at the transnational level inevitably involves advice . . . that are, or may be, affected by the laws of several jurisdictions as well as the growing body of international law. . . . As a practical matter it is simply not feasible to break that advice down into independent elements. . . . Rather, the rendering of such advice is an inherently synthetic process, involving close collaboration among lawyers with the requisite experience and qualifications in dealing with the various bodies of law that are actually or potentially involved. Lawyers advise on transactions and disputes, not on laws in the abstract; indeed, part of the task of the international practitioner is the determination as to which country's (or countries') laws will in fact apply to a given matter." Report to the House of Delegates of the Section of International Law & Practice, at 20 (1993).